

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

EVIG, LLC,,

Case No. 2:23-CV-833 JCM (BNW)

Plaintiff(s),

V.

NATURES NUTRA COMPANY,

ORDER

Defendant(s).

Digitized by srujanika@gmail.com

Presently before the court is defendant Natures Nutra Company's motion to dismiss plaintiff EVIG LLC's complaint. (ECF No. 7). Plaintiff filed a response (ECF No. 8), to which defendant replied (ECF No. 9).

I. Background

This matter arises out of alleged trade dress infringement. Plaintiff markets and sells health supplements that contain concentrated servings of fruit and vegetables. As alleged in the complaint, it has been selling its “proprietary blend” of nutrients for more than 20 years. (ECF No. 1-1).

Its products are sold in bottles with specific color schemes—red for fruits, green for vegetables, both with yellow lettering—feature a specific layout of fruits and vegetables on the packaging, and the text is set in a specific typeface (including replacing the letter a in the word nature with a leaf design). *See* (*id.* at 4). The bottles also both feature the words “Whole Produce” above either “Fruits” or “Veggies” depending on the product, and each bottle notes that it contains 90 capsules. (*Id.*) According to plaintiff, defendant has copied these allegedly distinctive elements in the packaging of its own supplements that compete with plaintiff’s

1 product, and plaintiff provides side-by-side photos of the products purporting to prove the
 2 similarity. (*Id.* at 5).

3 As a result, plaintiff brought this suit in state court alleging that that defendant has
 4 infringed upon its trade dress, amongst other claims. (ECF No. 1-1). Defendant then timely
 5 removed to this court (ECF No. 1) and now moves to dismiss the complaint in its entirety. (ECF
 6 No. 7).

7 **II. Legal Standard**

8 A court may dismiss a complaint for “failure to state a claim upon which relief can be
 9 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
 10 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
 11 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
 12 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of
 13 the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
 14 omitted).

15 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 16 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
 17 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
 18 omitted).

19 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 20 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 21 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
 22 truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by
 23 conclusory statements, do not suffice. *Id.* at 678.

24 Second, the court must consider whether the factual allegations in the complaint allege a
 25 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
 26 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
 27 the alleged misconduct. *Id.* at 678.

1 Where the complaint does not permit the court to infer more than the mere possibility of
 2 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.”
 3 *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the
 4 line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at
 5 570.

6 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
 7 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

8 First, to be entitled to the presumption of truth, allegations in a
 9 complaint or counterclaim may not simply recite the elements of a
 10 cause of action, but must contain sufficient allegations of
 11 underlying facts to give fair notice and to enable the opposing
 12 party to defend itself effectively. Second, the factual allegations
 13 that are taken as true must plausibly suggest an entitlement to
 14 relief, such that it is not unfair to require the opposing party to be
 15 subjected to the expense of discovery and continued litigation.

16 *Id.*

17 If the court grants a Rule 12(b)(6) motion to dismiss, it should grant leave to amend
 18 unless the deficiencies cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957
 19 F.2d 655, 658 (9th Cir. 1992). Under Rule 15(a), the court should “freely” give leave to amend
 20 “when justice so requires,” and absent “undue delay, bad faith, or dilatory motive on the part of
 21 the movant, repeated failure to cure deficiencies by amendments . . . undue prejudice to the
 22 opposing party . . . futility of the amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).
 23 The court should grant leave to amend “even if no request to amend the pleading was made.”
 24 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks
 25 omitted).

26 **III. Discussion**

27 Defendant seeks to dismiss each of plaintiff’s claims because they are insufficiently pled.
 28 Plaintiff responds with conclusory and irrelevant arguments that fail to explain how it has
 29 properly pled its claims for relief and intimates that the court should excuse any pleading
 30 deficiencies because defendant “understands the claims as set forth in the [c]omplaint.” (ECF
 31 No. 1-1 at 3). But whether a defendant “understands” the claims is irrelevant. Plaintiff must set

1 forth sufficient facts to state a claim of relief that is plausible (not merely possible) on its face.
 2 *Iqbal*, 556 U.S. at 678, Plaintiff has failed to do that here, and the court dismisses each of its
 3 claims.

4 A. Injunctive and Declaratory Relief

5 As an initial matter, the court dismisses plaintiff's first two causes of action—declaratory
 6 relief and injunctive relief. As to the declaratory relief claim, it is substantively identical to
 7 plaintiff's trade dress claim. It seeks a declaration that defendant has infringed on plaintiff's
 8 rights. Because adjudication of the trade dress claim requires the court to make exactly that
 9 determination, this claim is duplicative, and the court dismisses it.

10 As to the injunctive relief claim, injunctive relief is not an independent, free-standing
 11 cause of action. It is a form of relief the court may grant. Indeed, subsequent to this motion,
 12 plaintiff filed a motion for a preliminary injunction seeking exactly that relief. Thus, the court
 13 dismisses this claim as well, but it may issue injunctive relief as a remedy if appropriate.

14 B. False Advertising

15 Plaintiff's third cause of action is styled as a claim for "False Advertising/Lantham [sic]
 16 Act Violation/Unfair Competition." While this is, on its face, a run-of-the-mill Lanham Act
 17 claim, plaintiff's nomenclature is baffling for two reasons. First, plaintiffs asserts in its response
 18 that it "did not necessarily make a false advertising claim." (ECF No. 8 at 3). Second, the
 19 allegations in the complaint seem more akin to a false association claim than a false advertising
 20 claim—the two of which are markedly different claims with distinct legal analyses.

21 Plaintiff's response is similarly unhelpful in deciphering the basis for the claim. The only
 22 two legal citations contained as support for it are a nonsensical citation to 17 C.F.R. § 240c-6(a)
 23 (a Securities and Exchange Commission regulation defining a false or misleading statement in
 24 the context of a company's disclosure obligations prior to a shareholder meeting) and to 15
 25 U.S.C. § 1125(a)(1)(A) (the trade dress false association statute). Despite this, plaintiff goes on
 26 to analyze the five elements of a false advertising claim brought under § 1125(a)(1)(B) leaving
 27 the court unsure of plaintiff's intended claim.

28

1 The Supreme Court and the Ninth Circuit have both drawn sharp distinctions between
 2 claims brought under § 1125(a)(1)(A) and § 1125(a)(1)(B). *Lexmark Int'l, Inc. v. Static Control*
 3 *Components, Inc.*, 872 U.S. 118, 122 (2014) (*citing Waits v. Frito-Lay, Inc.*, 978 F.2d 1093,
 4 1108 (9th Cir. 1992)) (“Section 1125(a) thus creates two distinct bases of liability: false
 5 association, §1125(a)(1)(A), and false advertising, §1125(a)(1)(B).”). In a false advertising
 6 claim originating under subsection B, “the question is not confusion of source, but confusion as
 7 to a competing product's attributes.” *Spring Mills, Inc. v. Ultracashmere House, Ltd.*, 532 F.
 8 Supp. 1203, 1220 (S.D.N.Y. 1982), *rev'd on other grounds*, 689 F.2d 1127 (2d Cir. 1982). Put
 9 another way, false advertising claims focus on whether a defendant has made some false
 10 statement in advertising about the product that fundamentally misrepresents its qualities.

11 A false association claim under subsection A, on the other hand, serves as the functional
 12 equivalent of a traditional trademark infringement claim for unregistered marks and trade dress.
 13 *See 1-800 Contacts, Inc. v. Lens.Com, Inc.*, 722 F.3d 1229, 1238 (10th Cir. 2013). That is, the
 14 focus of the claim is on whether the trade dress (or unregistered mark) causes confusion by
 15 leading consumers to think that two products from different sources actually come from the same
 16 source. *See Waits*, 978 F.2d at 1108.

17 At bottom, the court understands plaintiff’s allegations to be that because defendant has
 18 allegedly copied plaintiff’s trade dress, it is falsely advertising its products as plaintiff’s and
 19 causing consumer confusion. That is a paradigmatic trade dress/false association violation claim,
 20 not a false advertising claim. The harm here is not that defendant has misrepresented the
 21 qualities of a product in some fundamental way; it is that its product looks too similar to
 22 plaintiff’s, and thus consumers will be confused into buying it rather than plaintiff’s competing
 23 supplements.

24 Regardless, the substance of plaintiff’s third cause of action fails under either analysis.
 25 As a false advertising claim, it misses the mark because the only allegation related to any sort of
 26 false or misleading statement and thus able to support this theory is the conclusory assertion
 27 “[t]hat [d]efendant advertised its products for sale on Amazon and made false or misleading
 28 statements about their [sic] products.” (ECF No. 1-1 at 8). The remaining accusations suggest

1 that defendant should be liable for causing consumers confusion as to the source of the
 2 products—i.e., a false association claim. As a false association claim, though, it is duplicative of
 3 the fifth cause of action for trade dress infringement. Therefore, the court dismisses plaintiff's
 4 third cause of action.

5 C. Intentional Interference with Prospective Economic Advantage

6 Plaintiff's fourth cause of action for intentional interference with economic relations also
 7 fails. That claim requires a plaintiff to allege “(1) a prospective contractual relationship between
 8 the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3)
 9 intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or
 10 justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's
 11 conduct.” *Consol. Generator–Nev., Inc. v. Cummins Engine Co.*, 971 P.2d 1251, 1255 (1998)
 12 (per curiam).

13 Courts in this district of regularly held that such generalized pleading about hypothetical
 14 consumers is insufficient to survive a motion to dismiss. *See Rimini St., v. Oracle Int'l Corp.*,
 15 2017 WL 5158658, at *9 (D. Nev. Nov. 7, 2017); *Coffee v. Stolidakis*, 2022 WL 2533535 (D.
 16 Nev. July 6, 2022); *Matthys v. Barrick Gold of N. Am.*, 2020 WL 7186745 (D. Nev. Dec. 4,
 17 2020). This court agrees.

18 Here, plaintiff's allegations are wholly speculative. Nowhere in the complaint does it
 19 identify a single consumer with whom it had a prospective contract that instead purchased
 20 defendant's goods. The allegations simply assume that defendant must have known that plaintiff
 21 had relationships with “consumers” generally.

22 As plaintiff acknowledges in its response, it does not currently know of any specific
 23 customers but in discovery it believes it “will learn the identity of the customers and will have
 24 the opportunity to inquire about their thoughts and impressions or misimpressions regarding the
 25 purchase of the products.” (ECF No. 8 at 8). Whether that is ultimately true or not is irrelevant;
 26 the complaint contains nothing but speculation that such a customer even exists. This court will
 27 not “condone the use of discovery to engage in fishing expeditions” when a plaintiff's allegations
 28

1 are based on mere speculation. *Webb v. Trader Joe's Co.*, 999 F.3d 1196, 1204 (9th Cir. 2021)
 2 (alterations, quotations, and citation omitted).

3 The complaint does little more than speculate that harm might have occurred while
 4 parroting the elements of this claim, and such “formulaic recitations” are insufficient to state a
 5 claim for relief. *Iqbal*, 556 U.S. at 678. Thus, the court will dismiss this claim as well.

6 **D. Trade Dress Violation**

7 Plaintiff's primary claim is its fifth cause of action for trade dress infringement, or as
 8 styled in the complaint “Latham [sic] Act, Trade Dress Violation.” (ECF No. 1-1 at 10). This
 9 claim, as with each of the others, is insufficiently pled and the court will dismiss it.

10 Trade dress must be both distinctive and nonfunctional to be protected. *Wal-Mart Stores,
 11 Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000). Several district courts in this circuit have
 12 determined that a party must set forth an exhaustive list of protected elements to successfully
 13 plead a claim for trade dress infringement. *See, e.g., Lepton Labs, LLC v. Walker*, 55 F. Supp. 3d
 14 1230, 1240 (C.D. Cal. 2014). This list of elements is designed to give a defendant notice of the
 15 specific trade dress elements it has allegedly infringed. *Id.* at 1240.

16 However, use of language like “including” or “for example” to introduce the list of
 17 elements fails to provide a defendant with notice because it does not clearly delineate the
 18 boundaries of the protection plaintiff claims. *See Mosaic Brands, Inc. v. Ridge Wallet LLC*, No.
 19 2:20-CV-04556-AB-JCX, 2020 WL 6821013, at *6 (C.D. Cal. Oct. 29, 2020) (citing *Sugarfina,
 20 Inc. v. Sweet Pete's LLC*, No. 17-cv-4456-RS-WL-JEM, 2017 WL 4271133, at *4 (C.D. Cal.
 21 Sept. 25, 2017)). In other words, when a party pleads a list of elements with a non-limiting
 22 qualifier, it does not give adequate notice of its intended claims and leaves the door open to an
 23 attempt to redefine the purportedly protected elements at a later stage of litigation. *See Sleep Sci.
 24 Partners v. Lieberman*, No. 09-04200 CW, 2010 WL 1881770, at *3 (N.D. Cal. May 10, 2010).

25 Here, plaintiff's claimed elements present two problems. First, the list of elements in
 26 paragraph 16 is preceded by a non-limiting qualifier—“includes.” (ECF No. 1-1 at 4). Second,
 27 plaintiff seeks to redefine the list even within the complaint by later including allegations that
 28 some of the labeling (the “supplemental facts”) is also protected trade dress despite not being

1 included in the list. (*Id.* at 10–11). Defendant cannot possibly have notice of the claims against
 2 it when even the complaint itself present a moving target.

3 Moreover, the complaint does not contain any allegations that plaintiff maintained
 4 priority of use (i.e., used the trade dress first) or that the alleged trade dress is nonfunctional.¹
 5 Plaintiff simply rattles off a list of the elements of trade dress infringement, concludes that the
 6 two products look similar, and proffers a side-by-side photograph that invites the court to draw
 7 its own conclusions. The court will not do so. Because plaintiff has not provided a bounded list
 8 of protectible elements or properly pled its pre-existing rights in its purported trade dress, the
 9 court will dismiss this claim as well.

10 E. State Law Dilution

11 Plaintiff's final claim alleges violation of the Nevada dilution statute, NRS 600.435.²
 12 Trademark dilution occurs when a junior user's mark causes a senior user's mark to lose its
 13 distinctiveness. *See Nev. Rev. Stat. 600.435(5)(b).* Amongst other things, a dilution claim
 14 requires that the plaintiff's mark be "famous," and the dilution statute lays out eight factors
 15 courts are to consider when evaluating claims of fame. *Id.* at 600.435(2)(a)–(h).

16 However, the court need not contend with that multi-factor test as plaintiff fails to even
 17 allege the mark is famous to begin with. It simply posits that it has used the mark for roughly 20
 18 years and assumes that makes the mark famous. However, courts in this district have found that
 19 a plaintiff must explicitly allege that the mark or trade dress is famous and support this
 20 contention to succeed on a dilution claim. *See Carpet Cops, Inc. v. Carpet Cops, LLC*, No. 3:11-
 21 CV-00561-RCJ, 2012 WL 3929783 (D. Nev. Sept. 6, 2012) (declining to award default judgment
 22 on a dilution claim where plaintiff did not allege the mark was famous in Nevada).

23

24

25 ¹ Indeed, while the court need not address functionality to adjudicate this motion, it is
 26 skeptical that certain elements are nonfunctional and thus protectible. In particular, the
 27 supplemental facts label that plaintiff claims is protected (but curiously omits from its non-
 28 exhaustive list of trade dress elements) seems to be a functional description of the ingredients.

29 ² Plaintiff's claim is styled as "Violation of NRS 600.435 and 600.440 and/or 600.450."
 30 (ECF No. 1-1 at 12). Section 600.450 discusses inapplicable criminal penalties, and 600.440
 31 provides that the list of statutory remedies for trade dress (and trademark) registrations also
 32 include common law remedies. Section 600.435 is thus the relevant statute here.

Moreover, as with the trade dress claim, plaintiff fails to establish priority of use. It does not allege when (even approximately) its trade dress allegedly became famous. Specifically, there are no allegations that the trade dress was famous before defendant allegedly began infringing and diluting it. Thus, this claim does not allow the court to infer more than a mere possibility of relief in its current state, and the court dismisses it.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to dismiss (ECF No. 7) be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that plaintiff's complaint be, and the same hereby is,
DISMISSED, without prejudice.

IT IS FURTHER ORDERED that plaintiff's motion for a preliminary injunction (ECF No. 11) be, and the same hereby is, DENIED as moot.

DATED August 2, 2023.

Xelius C. Mahan
UNITED STATES DISTRICT JUDGE